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IN THE UNITED STATES DISTRICT COURT

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FOR THE DISTRICT OF ARIZONA

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Randall Nunley, D.D.S.,

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No. 06-2626-PHX-MHM

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Plaintiff,

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ORDER

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vs.

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Berkshire Life Insurance Company of
America,

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Defendant.

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16 Currently before the Court is Berkshire Life Insurance Company of America's
17 ("Berkshire") Motion for Summary Judgment (Dkt.#76) and Dr. Randall Nunley's ("Dr.
18 Nunley") Cross-Motion for Summary Adjudication on Breach of Contract (Dkt.#115). After
19 reviewing these motions, responses, replies, statements of fact, and attached exhibits, the
20 Court issues the following order

21

I. Factual Background

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23 Dr. Nunley filed a complaint alleging breach of contract, bad faith, and emotional
24 distress. Dr. Nunley was a dentist who was injured in September 2004. He alleged that he
25 was totally unable to engage in his occupation by February 2004. According to his
26 complaint, Berkshire breached the insurance contract as well as its duty of good faith and fair
27 dealing by unreasonably denying and withholding insurance benefits due under the policy, by
28 unreasonably delaying payment of benefits, and by creating oppressive burdens for the
payment of benefits.

1 Berkshire seeks summary judgment on the basis that since it has already paid Dr.
2 Nunley for benefits, the breach of contract claim must be based on their delay in payment.
3 However, Berkshire claims that since Dr. Nunley did not provide the last piece of financial
4 information in January 2008, it was incapable of determining when benefits would begin to
5 be payable or how much was payable. Since it never denied Dr. Nunley's claim and lacked
6 required information to calculate the claim, Berkshire argues that at most, their behavior was
7 negligent and cannot be the basis of a bad faith claim as a matter of law. Moreover, if it is
8 not liable for bad faith, it cannot be liable for punitive damages. (Dkt. #76)

9 Dr. Nunley, in turn, cross-moves for summary judgment on the breach of contract
10 claim by arguing that Berkshire's retroactive payment constitutes an admission that breach
11 occurred. He argues that the payment is evidence that the loss was covered and that
12 Berkshire knew it was covered. He further argues that unreasonable delay in payment is
13 grounds for a finding that Berkshire acted in bad faith. He argues that Berkshire had "ample
14 objective evidence to issue payment as early as May of 2005" and that it acted with a
15 conscious disregard to Dr. Nunley's financial situation, which provides a basis for punitive
16 damages. (Dkt. #82 at 14) Therefore, Dr. Nunley appears to allege that he was denied
17 payment from May 2005 until March 23, 2008. (Dkt.#82 at 11,14)

18 **II. Summary Judgment Standard**

19 Summary judgment is appropriate when there is no genuine issue of material fact and
20 the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56©. In
21 analyzing the motions for summary judgment, the Court views the evidence in the light most
22 favorable to the nonmoving party. *Horphag Research Ltd. v. Garcia*, 475 F.3d 1029, 1935
23 (9th Cir. 2007). "Summary judgment is inappropriate if a reasonable juror, drawing all
24 inferences in favor of the nonmoving party, could return a verdict in the nonmoving party's
25 favor. *James River Ins. Co. v. Herbert Schenk, P.C.*, 523 F.3d 915, 920 (9th Cir. 2008).

26 Here, summary judgment is inappropriate because the question of whether Berkshire
27 acted reasonably in delaying payment to Dr. Nunley for three years is a question of fact for
28

1 the jury. The parties dispute whether the delay was caused by Berkshire's bad faith or
2 whether it was caused by a good-faith lack of sufficient information to make the payment.

3 **III. Undisputed Facts**

4 The undisputed facts are as follows: Dr. Nunley, a dentist, purchased disability
5 insurance from Berkshire and a policy (no. Z0432650) was issued on November 20, 2003.
6 The Policy provided a \$10,000 monthly benefit if Dr. Nunley met the terms and conditions
7 for total disability. The Policy also contained a Residual Disability Rider which essentially
8 provided a proportionate amount of monthly benefit (based on loss of monthly income) if Dr.
9 Nunley worked, and was not totally disabled, but suffered a loss of income because of the
10 sickness or injury. In January 2005, Berkshire was notified by Dr. Nunley's insurance agent
11 that he was making a claim for benefits. (Dkt.#s 77, 114) Berkshire received the claim for
12 benefits on April 1, 2005. Dr. Nunley reported that he began having pain and stiffness in his
13 left forearm on September 13, 2004 and as a result reduced his work schedule from 40 hours
14 a week to 20. Additionally, while having the problems with his left arm, Dr. Nunley went
15 skiing in February 2005 and injured his right thumb, which required surgery. Dr. Nunley
16 claimed he became totally disabled on February 14, 2005. His surgeon, Dr. Dinowitz, noted
17 prognosis for return to work was three to six months.

18 **IV. Disputed Facts**

19 However, what happened next appears to be in dispute. According to Dr. Nunley, "it
20 was not until this lawsuit was filed, which was more than 18 months after Dr. Nunley
21 submitted his claim to Berkshire, that Berkshire requested the "additional information" that
22 it supposedly needed to evaluate Dr. Nunley's claim. (Dkt.#83 ¶ 84). However, Berkshire
23 disputes this statement, and claims that "it had been requesting information from Dr. Nunley
24 throughout the claim handling process and Berkshire's requests had gone unanswered. (Dkt.
25 #125 at ¶ 84) Berkshire claims that "it could not pay Dr. Nunley until the elimination period
26 and residual disability benefit amount were calculated under the terms of the Policy and
27 Rider, and Berkshire could not make those calculations until it received the necessary
28 information – all of which was in Dr. Nunley's possession." (Dkt. # 125 ¶ 35) According

1 to Berkshire, payment was made to Dr. Nunley as timely as possible based on the date the
2 requisite information was received from Dr. Nunley.” (*Id.*) One Berkshire employee
3 testified that the earliest that Dr. Nunley’s benefits calculation could have been made was
4 February 2008. (*Id.*)

5 However, Dr. Nunley cites the deposition testimony of another Berkshire employee,
6 Ms. Reagan, who agreed that as early as August 2005, there was a period of total disability
7 with regard to Dr. Nunley’s thumb injury and she knew that Dr. Nunley was unable to
8 practice dentistry. However, because she was unsure when the period of total disability
9 ended and the period of partial disability began, she refused to pay anything until March 28,
10 2008. (Dkt. #83 ¶ 40) Instead, she ordered surveillance on Dr. Nunley for reasons that were
11 never documented in the claim file. (Dkt. # 83 ¶¶ 41-42) Dr. Nunley stated that he contacted
12 Berkshire on several occasions to express his frustration with the delay in payment and to
13 inform them that he was experiencing financial difficulties and had virtually no income since
14 February 2005. (Dkt. #83 at ¶ 44) He explained that he was not in possession of any
15 business tax returns since he had sold his practice. However, Berkshire once again requested
16 his business tax returns in September 1, 2005. (Dkt. # 83 ¶ 44) According to Dr. Nunley,
17 by December 30, 2005, Berkshire had done the following: obtained medical records; ordered
18 a medical review; conducted surveillance twice; requested additional medical records and
19 tax returns; obtained employer statements, operatory schedules, and appointment books; held
20 teleconferences with Dr. Nunley’s treating physician and surgeon; conducted a field
21 investigation; and consulted underwriting. (Dkt. # 83 ¶ 53) However, it still refused to pay
22 or deny Dr. Nunley’s claim. (*Id.*) While Berkshire does not dispute that it did these things,
23 it “notes that as of December 30, 2005, it still did not have the requisite information to
24 calculate either the elimination period or the amount of Dr. Nunley’s residual benefit.” (Dkt.
25 #125 ¶ 53)

26 As the above paragraphs demonstrate, even basic facts such as whether Berkshire in
27 fact requested additional information that Dr. Nunley did not provide in the period from
28 September 2006 to January 2008 are disputed. Also disputed is whether Berkshire needed

1 the additional information to determine that the loss was covered by the policy. As such, it
2 is inappropriate to decide this case at summary judgment.

3 There are other problems with both motions as well. For example, Berkshire
4 mistakenly asserts that Dr. Nunley did not controvert any statement of fact set forth in
5 Berkshire's Statement of Facts in Support of its Motion for Summary Judgment and argues
6 that all of the facts set forth are deemed admitted; however, Dr. Nunley controverted many
7 statements in Berkshire's Statement of Facts. (Dkt. #114) In addition, Dr. Nunley's
8 argument that Berkshire's eventual partial payment of the claim is an admission that the
9 claim was covered does not address whether Berkshire had sufficient information to pay the
10 claim sooner than it did. It appears that even if the loss was covered, Berkshire had no
11 obligation to make payments unless and until Dr. Nunley presented sufficient proof of the
12 loss.

13 Because there are disputed issues of material fact, Berkshire's motion for summary
14 judgment is denied. (Dkt.#76) For similar reasons, Dr. Nunley's cross motion for summary
15 judgment as to breach of contract is likewise denied. (Dkt.#115)

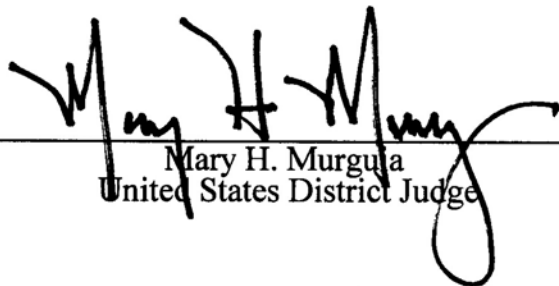
16 **Accordingly,**

17 **IT IS HEREBY ORDERED DENYING** Berkshire's motion for summary judgment
18 and Dr. Nunley's cross-motion for summary judgment. (Dkt.#s 76, 115)

19 **IT IS FURTHER ORDERED** setting this matter for a status hearing on April 6,
20 2009 at 3:30 PM to set a firm trial date.

21 DATED this 1st day of March, 2009.

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Mary H. Murgula
United States District Judge